Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)))	CS Docket No. 02-52

COMMENTS OF COX COMMUNICATIONS, INC.

Respectfully submitted,

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Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments in the above-referenced proceeding regarding the appropriate regulatory treatment for broadband access to the Internet over cable facilities.[1] On March 15, 2002, the Commission issued a declaratory ruling that cable modem service "is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service."[2] As a result of its ruling that this service is an interstate information service – mandated by the express provisions of the Communications Act of 1934, as amended (the "Act" or the "Communications Act") – there are strict statutory limitations on the authority of both the Commission and state and local governments to regulate cable modem service. For the reasons set forth below, Cox urges the Commission to confirm that, for a variety of legal, policy and customer service reasons, the provision of cable modem service must remain unfettered from intrusive government involvement.

[1] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment of Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77 (rel. Mar. 15, 2002) ("*Ruling & Notice*").

[2] *Id.* at ¶ 7.

INTRODUCTION AND SUMMARY

No other service provider has done more to jumpstart the deployment of residential broadband than the cable industry. At a time when the phone companies had placed digital subscriber line ("DSL") technology safely on the shelf, cable companies like Cox invested billions of dollars and took enormous risks to develop the technology and operational support needed to provide high-speed Internet access to consumers across the country. Cox's efforts, like those of other MSOs, have paid off: At the end of the first quarter of 2002, Cox was able to offer residential cable modem service to over nine million homes, and had over one million cable modem service subscribers.

The FCC has been closely monitoring the deployment of broadband services in general, and cable modem service in particular, since their introduction into the marketplace roughly six years ago. It has devoted countless hours to evaluating a host of legal, technical, policy, economic and operational issues to ensure that it fulfills its statutory mandate to promote the rapid deployment of broadband services to all Americans.[3] Myriad parties from both the private and public sectors have submitted extensive comments on these very same issues. The time has now come for the Commission to complete its analysis and provide regulatory certainty to the broadband marketplace.

For cable modem service providers, this means that the Commission must articulate the regulatory ramifications of its recent determination that cable modem service is a Title I interstate information service. As discussed in detail below, this fortunately is not a difficult job. Congress has explicitly directed that interstate information services be spared the heavy hand of

[3] Telecommunications Act of 1996, Pub. L. 104-104, Title VII, § 706, 110 Stat. 153, set forth at 47 U.S.C. § 157.

government regulation. Accordingly, the Commission's principal task in this proceeding is to confirm that there is no role for extensive regulation of cable modem service at any level of government, whether in the form of mandatory access requirements, additional local franchise obligations, or otherwise.

The Telecommunications Act of 1996 (the "1996 Act") draws a bright line between lightly regulated Title I information services and more heavily (and specifically) regulated Title II telecommunications services and Title VI cable services. Moreover, Congress also has expressly stated its intent to protect "the Internet and other interactive computer services, unfettered by Federal or State regulation."[4] By definition, cable modem service providers (and other interstate information service providers) are not common carriers. They cannot lawfully be subjected to common carrier-like requirements, such as mandatory access obligations, in the name of "regulatory parity" or anything else. While the Commission's ancillary jurisdiction under Title I permits it to take actions necessary to discharge its statutory responsibilities, that jurisdiction plainly does not authorize the Commission to rewrite the statute. Furthermore, mandated access would violate cable operators' First Amendment rights and implicate the Fifth Amendment bar on takings.

In addition to being contrary to the Act and the Constitution, mandating access to the cable modem platform would be a public policy mistake. The courts repeatedly have emphasized the fundamental legal principle that, even where the Commission has express authority to regulate, it must have actual evidence of a market failure and demonstrate that its regulations provide the necessary cure. Internet access services remain highly competitive,

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[4] 47 U.S.C. § 230(b).

obviating any policy predicate for mandating cable operators' carriage of unaffiliated Internet service providers ("ISPs"). The Commission's own studies consistently have demonstrated that, just as consumers have a range of options to access the Internet, service providers have a variety of broadband options to provide an Internet connection. Cable operators have added and will continue to add additional ISPs to the cable modem platform under reasonable, but individually negotiated, terms and conditions. They are doing so because it makes good business sense. In contrast, mandated access would undermine the dependability of the platform, negatively affect other service offerings using the shared cable spectrum, impede technical and business innovation, impose prohibitive costs and discourage capital investment – all to the detriment of consumers and explicit congressional policy.

As harmful as federal access requirements would be, piecemeal regulation of cable modem service at the state or local level would be even more damaging to broadband development. It is not surprising, therefore, that the Act reserves no legal authority for state and local governments to regulate this interstate information service. To the contrary, various provisions of federal law specifically prohibit local governments from either adopting information service requirements for cable operators or imposing cable modem franchise fees. The Commission should explicitly clarify that state and local regulation of cable modem service is impermissible under existing law. Such regulation inevitably would encroach on the Commission's authority and impede its implementation of the national policy, set forth by Congress, to promote broadband deployment and to keep the Internet free of government-imposed requirements.

The Commission also should address two critical issues created by the lengthy period of regulatory uncertainty surrounding the proper statutory classification of cable modem service.

During that period, many cable operators and local governments collected cable franchise fees on gross revenues from cable modem services under the good faith belief that these services were cable services under the Act. As the Commission has observed, its recent ruling that cable modem services are not cable services raises the question whether the fees paid to local governments during the prior period should be refunded to subscribers. This issue – which confronts local governments, cable operators and subscribers nationwide – stems directly from the Commission's extended period of deliberation over the classification issue. Since the issue plainly is a national problem, and since only the Commission can provide a uniform resolution, the Commission should finish what it started by asserting jurisdiction to resolve such refund disputes.

The public interest in uniform national rules likewise mandates the Commission's exercise of its authority to forbear from enforcement of Title II regulation, to the extent cable modem service may be subject to such regulation in the Ninth Circuit. There is no justifiable basis for regulating the service differently in the Ninth Circuit than in all other parts of the country. Just as in the rest of the country, healthy competition in the provision of broadband and Internet services in the Ninth Circuit makes common carrier regulation of cable modem service unnecessary to ensure just and reasonable practices and to protect consumers. The Ninth Circuit Court of Appeals recognized the Commission's broad authority to forbear in *AT&T v. City of Portland*. In reviewing the *Ruling & Notice* with the substantial deference mandated by the Supreme Court's recent decision in *NCTA v. Gulf Power Co.*, the Ninth Circuit should defer to the Commission's expert determination that cable modem service is properly classified as an interstate information service. The Commission has all the more reason to forbear in order to ensure uniformity during the interim period while awaiting the Ninth Circuit's decision.

The Sword of Damocles has hung over the heads of cable modem service providers for too many years. In round after round of debate and attack, those who seek extensive regulation of cable modem services have failed to identify a single applicable statutory provision permitting such regulation, let alone establish the market failure that must precede its imposition. It is time for the Commission to end the threat of regulation and allow cable modem services to reach their full potential as an exciting broadband alternative for American consumers.

I. THERE IS NO LEGAL BASIS FOR THE COMMISSION TO IMPOSE ACCESS REQUIREMENTS ON CABLE MODEM SERVICE.

As the *Ruling & Notice* observed, there are three potential sources for the Commission's ancillary jurisdiction to regulate cable modem service as a Title I interstate information service – Sections 1, 2(a) and 4(i) of the Act.[5] Section 1 of the Act charges the Commission with "execut[ing] and enforc[ing] the provisions of the Act," and Section 2(a) states that "[t]he provisions of this act shall apply to all interstate and foreign communication by wire or radio . . . and . . . all persons engaged within the United States in such communication."[6] Yet neither of these directives endows the Commission with regulatory authority beyond the provisions of the Act. Section 4(i) more broadly provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, . . . as may be *necessary* in the execution of its functions," but stresses that any such actions must be consistent with the remaining provisions of the Act.[7] The express terms of Sections 1, 2(a) and 4(i) thus make clear that the Commission's ancillary jurisdiction is limited to actions necessary to effectuate the express

[5] *Ruling & Notice*, FCC 02-77 at ¶ 75.

[6] *Id.* (quoting 47 U.S.C. §§ 151, 152(a)).

[7] 47 U.S.C. § 154(i) (emphasis added).

provisions of the Act, and is never to conflict with the statutory scheme that Congress has adopted.

The Supreme Court's opinion in *Midwest Video* provides the roadmap to analysis of the Commission's ancillary jurisdiction.[8] Application of that analytical framework reveals three independent reasons why ancillary jurisdiction cannot support the creation of access requirements for cable modem service. First, the imposition of such access regulations is unnecessary to the Commission's discharge of its statutory responsibility with regard to any service that Congress explicitly has charged it to regulate. Second, the Commission's assertion of ancillary jurisdiction is not necessary to address a threat to the communications regulatory framework that was unforeseen by Congress -- Congress was fully aware of the development of Internet access services at the time it adopted the 1996 Act, when it established a separate regulatory classification for Title I information services. Third, the Commission cannot invoke its ancillary jurisdiction to create rules that contravene Congress's directive that information services, particularly Internet access services such as cable modem service, remain unfettered from intrusive government regulation. The ancillary jurisdiction that Congress granted to the Commission under the Act simply does not empower the agency to rewrite the statute.

A. The Commission's Ancillary Jurisdiction Cannot Support The Imposition Of Access Requirements On Entities Already Found To Be Non-Common Carriers Providing Information Services.

As the Supreme Court recognized in *Midwest Video*, the Commission's ancillary jurisdiction under Title I only allows it to act to counter a threat, unforeseen by Congress, to

[8] *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video*") (barring Commission's exercise of ancillary jurisdiction to impose cable TV channel set-aside requirements).

services over which the Commission has explicit authority to regulate.[9] For example, the Court explained that the Commission could exercise ancillary jurisdiction to adopt certain regulations for cable services (before Congress provided it with explicit jurisdiction under the 1984 Cable Act) "because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities. Specifically, regulation was imperative to prevent interference with the Commission's work in the broadcasting area."[10] The Commission could exercise ancillary jurisdiction beyond the precise provisions of the Act because "Congress could not in 1934 have foreseen the development of community antenna television systems."[11] That jurisdiction was not unbounded, however. Although it recognized that "[c]able operators had become enmeshed in the field of television broadcasting," the Court nonetheless permitted the Commission to exercise only that amount of authority necessary to protect the broadcasting services under its statutory jurisdiction, until Congress granted explicit statutory permission for it to regulate cable services.[12]

Similarly, the Circuit Courts upheld the Commission's exercise of ancillary jurisdiction over ILECs' enhanced services under the 1980s *Computer Inquiries* in recognition that the Act, passed in 1934, predated the development of computer services and thus could not explicitly address the impact of this new technology on the regulatory scheme for traditional telephone service.[13] As the Second Circuit explained, the Commission's exercise of ancillary jurisdiction was authorized only to the extent that it was "directed at eliminating the potential hazards to

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[9] *Id.* at 700.

[10] *Id.* at 706-07 (citations omitted).

[11] *United States v. Midwest Video Corp.*, 406 U.S. 649, 660 (1972) (plurality op.).

[12] *Midwest Video*, 440 U.S. at 700.

[13] *GTE Service Corp. v. FCC*, 474 F.2d 724, 730 (2d Cir. 1973).

efficient and economical phone service which is clearly the Commission's primary responsibility and interest here."[14] The D.C. Circuit similarly found that "it was reasonable for the Commission to exercise jurisdiction over carrier-provided CPE [customer premises equipment] to ensure that rates for carrier transmission services are not based upon costs associated with the provision of CPE."[15] Indeed, it is because the Commission's exercise of ancillary jurisdiction over ILEC-provided information services was based on the protection of regulated telephone services that, "for more than twenty years, *Computer II* [and *Computer III*] obligations have been applied exclusively to [ILECs'] traditional wireline services and facilities."[16]

There is no evidence that the absence of access requirements or other regulation of cable modem service would threaten the Commission's ability to protect any service that it has been tasked to regulate.[17] There also can be no claim that the Commission must exercise ancillary jurisdiction to counter such an alleged threat because Congress was unaware of the existence of broadband or Internet services when it adopted the 1996 Act and had no opportunity to adopt regulatory requirements or authorize the Commission to do so. To the contrary, Congress was fully aware of developments in the Internet access marketplace and chose to keep these services unfettered from federal, state and local regulation.

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[14] *Id.* at 732 ("Specifically, the Commission was concerned that data processing costs would be passed on directly or indirectly to the public consumer of telephone services and that revenues derived from common carrier services would be used to subsidize data processing services.").

[15] *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) ("*CCIA*").

[16] The Commission made just this observation when ruling, correctly, that the *Computer Inquiries* obligations do not apply to cable modem service. *Ruling & Notice,* FCC 02-77 at ¶¶ 43-44.

[17] *See* Section I(B), *infra*, for a discussion of why the ILECs' calls for "regulatory parity" do not justify extension of common carrier access requirements to non-common carrier information service providers.

The Supreme Court emphasized in *Midwest Video* that the Commission cannot assert ancillary jurisdiction to regulate where Congress has given "indications that agency flexibility was to be sharply delimited."[18] In this instance, the Commission's ancillary jurisdiction cannot be used to erase the bright line limitations Congress has drawn against the agency's regulation of information services, particularly Internet services such as cable modem services. As Chairman Powell explained in his separate statement on the *Ruling & Notice*,

> If one looks throughout the statute, one will see clearly that Congress ascribed different regulatory treatment to these [Title I, Title II and Title VI] classifications – sometimes more regulatory oversight, sometimes less. . . . Most importantly, "information service" is a conscious regulatory classification under the statute. Not only is it defined, there are specific references to it throughout the statute.[19]

Chairman Powell referred to the Act's provision granting the Commission permissive authority to impose universal service obligations on telecommunications providers who are not telecommunications carriers, the provisions entitling schools and libraries to receive discounted information services, and the provision requiring ILECs to make their network infrastructure available to other qualifying carriers for the provision of telecommunications and information services.[20] These specific statutory references to information services make all the more clear Congress' intent that these services be free from regulation beyond the scope of these provisions.

The *Ruling & Notice* asks whether the Commission can and should impose access regulations on cable modem service along the model of the leased access rules for cable

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[18] *Midwest Video*, 440 U.S. at 708.

[19] *Ruling & Notice*, FCC 02-77 (Separate Statement of Chairman Michael Powell).

[20] *Id.*

operators or the interconnection and unbundling rules for ILECs.[21] However, far from being creations of the Commission in pursuit of its statutory responsibilities, the cited access regulations required express congressional authorization. Absent a similar, explicit statutory authorization, the Commission's ancillary jurisdiction cannot support the imposition of access requirements on entities already found to be non-common carriers. As the Supreme Court held in *Midwest Video*, "[t]he Commission may not regulate cable systems as common carriers [because] authority to compel cable operators to provide common carriage . . . must come specifically from Congress."[22] In striking down the Commission's requirement that cable operators make available certain channels for access by third party programmers, the Court observed that, "the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common carrier status."[23] Likewise, a requirement for cable operators to provide indiscriminate access to unaffiliated ISPs would impermissibly deprive cable operators of control over their cable systems without the sanction of Congress.

The bar against the creation of access regulations is particularly high in the case of Internet access services, such as cable modem service, that cannot, and need not, be offered on a common carrier basis. As explained at length in Cox's comments in the *Notice of Inquiry*

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[21] *Ruling & Notice,* FCC 02-77 at ¶ 74.

[22] *Midwest Video*, 440 U.S. at 709. Similarly, it was Congress, not the Commission, that adopted interconnection and unbundling requirements for ILECs, and the courts have not been hesitant to remind the Commission that it is not free to interpret those obligations broadly. *See, e.g.*, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999) ("*Iowa Utilities Board*"); *U.S. Telecom. Ass'n v. FCC*, No. 00-1012, slip op. (D.C. Cir. May 24, 2002) ("*USTA v. FCC*").

[23] *Midwest Video*, 440 U.S. at 700-01.

("*NOI*"), there are innumerable technical, operational and business obstacles to imposing common carrier requirements on cable modem service providers.[24] Ignoring these very real practical impediments would plunge both providers and their broadband customers into an operational and regulatory quagmire – a result squarely at odds with Congress' express directive "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[25]

B. Ideological Arguments For Parity In Regulation Cannot Justify The Commission's Imposition Of Access Requirements On Information Services Provided By Cable Operators.

Far from being an equitable goal, the quest for parity in broadband regulation is an ideological issue that cannot be used to justify the Commission's creation of access regulations for information services provided by cable operators. Congress established the regulatory framework, and it is up to Congress, not the Commission, to change that framework if it sees fit. Congress expressly created different regulatory regimes for a variety of industry sectors based on differences in their histories, networks and services. The Commission is required to respect these regulatory classifications as a matter of law.

Cable operators (and the information services they provide) accordingly must be evaluated on their own statutory terms – and not on the regulatory framework applicable to

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[24] *See, e.g.* Cox Communications, Inc., Comments in GN Dkt. No. 00-185 at 21-26 (filed Dec. 1, 2000) ("Cox *NOI* Comments"); *See also* Section III, *infra.*

[25] 47 U.S.C. § 230(b). *See also America Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 856-57 (E.D. Va. 1999) (No "federal or state court has applied common carrier regulation – either generally or specifically on the discrimination provision – to an information service provider. Thus, this Court will not be the first to do so, especially in the face of contrary direction by Congress . . .."); *Howard v. America Online, Inc.*, 208 F.3d 741, 753 (9th Cir.) (Internet service providers are not subject to common carrier regulation under the Act, especially in light of Congress' express directive to keep them unfettered from federal and state regulation), *cert. denied*, 531 U.S. 828 (2000).

ILECs. In stark contrast to cable companies, ILECs voluntarily built their business under the common carrier framework. The duties imposed under that framework served as the *quid pro quo* for the ILECs' historical, profitable designation as the protected service provider. Telephone ratepayers paid for ILEC construction of their ubiquitous networks, and ILECs operated for many decades as government-protected monopolies. Even today, ILECs continue to enjoy the benefits of common carrier status (e.g., guaranteed access to rights-of-way, implicit and explicit subsidies). In choosing the privileges of operating as protected common carriers, ILECs also had to accept the attendant regulatory obligations.

By contrast, cable operators and other service providers, from satellite operators to Internet backbone providers, made enormous risk investments and built their businesses outside of the common carrier framework. They have had to raise and risk the capital investments to build and upgrade their networks, develop the technology to provide their suite of services, and deploy and stimulate customer acceptance of these services. To launch their businesses, they have had to operate as cash flow negative operations in markets where they have no protected monopoly over a lifeline service, only an opportunity to fail or succeed based on the value of their products. The assumption of these risks – without the guarantee of a government-backed rate-of-return – fundamentally distinguishes these service providers from traditional common carriers such as ILECs.

Cable operators are, of course, subject to numerous regulatory obligations under the regulatory scheme Congress established. Those obligations, however, do not extend to requirements to provide access to third party ISPs on an indiscriminate basis. If the Commission were to take the unprecedented step of utilizing its ancillary jurisdiction to impose such access requirements on cable modem service providers, it would place untold numbers of information service providers and other non-common carriers at risk of burdensome regulation. Such regulation would undermine the reasonable business expectations of both these providers and the investment community, with detrimental results for future capital investment in and deployment of advanced communications services.

Whether or not the provision of such access would be technically possible for the cable modem platform or should be required of ILECs providing broadband services is not the question. Indeed, resolution of these issues cannot lawfully be used to decide cable's fate. As the courts have observed, the Commission cannot impose access requirements on non-common carriers simply because it believes it to be a "good," "nice"[26] or "equitable" idea:

> [N]othing whatever in the Act, or anywhere else, gives the Commission the unlimited right to say to any private industry, "We believe we have seen the future, and you must construct it." Because an industry can do something cannot be the sole basis for a federal agency's peace-time jurisdiction to make it do it.[27]

As the Commission recognizes, "the extent of [its] regulatory authority is not automatically expanded with advances in technology and the types of enhanced services that can be offered."[28] The Act simply does not allow the Commission, in the name of "regulatory parity," to impose access requirements on entities, such as cable modem service providers, that are not, by statute, common carriers.

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[26] *See also* COMM. DAILY, May 31, 2002, at 6 (Statement of Commissioner Kathleen Abernathy that the Commission cannot impose access requirements on cable modem service providers "just . . . because you think it's nice.").

[27] *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1044 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

[28] Amendment of Section 67.702 of the Commission's Rules and Regulations, *Final Decision*, 77 F.C.C.2d 384, 429 (1980) ("*Computer II*").

II. THERE IS NO DEMONSTRATED MARKET FAILURE TO JUSTIFY THE IMPOSITION OF ACCESS REQUIREMENTS ON CABLE MODEM SERVICE.

In addition to a lack of legal authority, there is also no policy predicate for mandating access to the cable modem platform, because there is simply no evidence of a market failure to justify government intervention. In conducting the *Computer Inquiries* which helped to foster the explosive growth of enhanced services and the Internet, the Commission abided by the fundamental legal principle that "Commission regulation must be directed at protecting or promoting a statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist."[29] The D.C. Circuit upheld the Commission's action, observing that

> Because the Commission found that the market for enhanced services is "truly competitive," it believes that market forces will protect the public interest in reasonable rates and availability of services. Therefore, in the Commission's view, comprehensive regulation of enhanced services would not be permissible because it would not be "directed at protecting or promoting a statutory purpose."[30]

In short, the Commission "remove[d] the threat of regulation" from enhanced services because the absence of evidence of a market failure negated any justification for "the imposition of economic regulation by an administrative agency."[31] Congress applied the same analysis in 1996 when creating the Title I information services category and simultaneously protecting it from the reach of zealous regulation.[32] As explained in detail below, this congressional decision to

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[29] *Id.* at 433 (citations omitted). *See also* Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11546 (1998) ("*Report to Congress*") ("The Internet and other enhanced services have been able to grow rapidly in part because the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act.").

[30] *CCIA*, 693 F.2d at 207 (footnotes omitted).

[31] *Computer II*, 77 F.C.C.2d at 423.

[32] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of*

continued...

"remove the threat of regulation" from Internet access services plainly precludes the imposition of mandatory access requirements on cable modem service.

A. Internet Access Services Remain Highly Competitive.

In proceeding after proceeding over the past several years, the Commission has concluded that competition for Internet access in general, and broadband access in particular, is healthy and growing. The Commission's *Section 706 Reports* have consistently found significant and accelerating growth in broadband deployment and competition among service providers using a variety of technology platforms.[33] In addition, residential broadband Internet service providers face strong competitive pressure from dial-up access services. As the Commission observed in the *Ruling & Notice*, "the vast majority of [U.S. households with Internet connections] subscribe to 'narrowband' service provided over local telephone

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Proposed Rulemaking, 11 FCC Rcd 21905, 21957 (1996) ("*Non-Accounting Safeguards I*") (Congress intended that the term "information services" would extend to the same functions as "enhanced services," except that "'enhanced services' under Commission precedent are limited to services 'offered over common carrier transmission facilities used in interstate communications,' whereas 'information services' may be provided, more broadly, 'via telecommunications.'").

[33] *See, e.g.*, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, 14 FCC Rcd 2398, 2415 (1999) ("*First Section 706 Report*"); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Second Report*, 22 Communications Reg. (P & F) 390, 451 (2000) ("*Second Section 706 Report*"); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Third Report*, CC Docket No. 98-146, FCC 02-33, ¶¶ 7, 68-72, 77-78, 80-88 (rel. Feb. 6, 2002) ("*Third Section 706 Report*").

facilities."[34] Cox's own extensive experience in providing cable modem service confirms that Internet access service providers using both broadband and narrowband technologies compete fiercely for consumers' business.[35]

As Commerce Deputy Assistant Secretary for Technology Policy Chris Israel recently noted, many consumers are reluctant to pay a higher price for broadband services "to get basically the same content available for a much lower price" through dial-up Internet access.[36] Indeed, 75% of Internet access customers remain satisfied with narrowband service.[37] This is not surprising -- most residential customers use the Internet primarily for e-mail and web surfing purposes, activities that are supported readily by a dial-up service. Although applications requiring greater bandwidth are being developed and may become more readily available as broadband deployment grows, they have yet to become integral to the Internet experience. Accordingly, dial-up services continue to dominate the provision of Internet services in markets nationwide, regardless of whether there are also multiple providers of broadband services in those markets. This continued market presence by narrowband service providers reveals that

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[34] *Ruling & Notice*, FCC 02-77 at ¶ 9.

[35] For example, in Omaha, Nebraska, Cox's cable modem service faces vigorous competition from a variety of DSL Internet service offerings by Qwest, AOL Time Warner, DirecTV and Echostar, in addition to wireless broadband services from Sprint and dial-up Internet access services from McLeod USA and numerous ISPs. These providers offer Omaha customers a variety of service options. For instance, Qwest's offerings of residential voice, video and data services range from 256Kbps DSL service for $39.95 a month or 640Kbps DSL service for $49.95 a month, to a $99.89 a month "Total Package" that includes 256 Kbps DSL service, a telephone line with up to 20 features that can be added or changed, and wireless telephone service with 1,000 anytime minutes. *See also* Cox *NOI* Comments at 9 - 11 (providing examples of competition faced by Cox cable modem service in various markets).

[36] *See* COMM. DAILY, June 4, 2002, at 6.

[37] *Id.*

consumers plainly continue to view dial-up and broadband services as being substitutes for each other.

Cox and other cable operators are exploring ways to provide multiple tiers of cable modem service in order to offer consumers an even wider range of prices and speeds of Internet access. For example, Cox is commencing a marketing trial in Connecticut to provide a second tier of cable modem service that offers downstream and upstream speeds of approximately 128Kbps, in addition to its standard service offering of up to 3Mbps downstream and 256Kbps upstream speeds. Cox is marketing the 128Kbps cable modem service under the theme "Twice the Speed of Dial-up for $23.95," and its marketing materials provide a direct comparison of this service's features against dial-up service features. Other cable operators likewise are starting to provide tiered service offerings to respond to the direct competition from dial-up Internet access services.[38]

Cox and other cable operators are undertaking the costs of developing tiered service offerings in recognition of a simple fact: It would be foolhardy for an Internet access provider to presume that a consumer considering cable modem, DSL or satellite broadband Internet access services would not compare their prices and services against those provided by dial-up offerings in making his purchasing decision. As an increasing variety of access speeds becomes available to consumers at a range of price points, it becomes even more apparent that competition among Internet access providers is not delimited by any bright line drawn on the basis of bit rates. Robust competition continues to flourish among Internet access service providers using both broadband and narrowband technologies.

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[38] *See* Peter J. Howe, *AT&T Broadband May Offer Massachusetts Slightly Slower Service for Lower Cost*, THE BOSTON GLOBE, June 11, 2002.

B. The Absence Of A Breakdown In The Market Obviates Any Basis For Government Intervention To Mandate Access To Non-Wireline Broadband Platforms.

As the foregoing record demonstrates, there is no evidence that non-wireline broadband services must be subjected to access requirements in order to ensure that competition develops or that American consumers are well-served.[39] The only way to impose non-discriminatory access requirements on broadband service providers is to force them all into the "dumb pipe" transport business. But destroying investment expectations and forcing non-common carriers to completely redesign their networks and revamp their business plans in order to provide third-party access makes no sense in a competitive marketplace, especially where government is encouraging providers to deploy broadband as rapidly as possible.

Recent court decisions stress the basic legal principle that the Commission cannot regulate any industry based on speculation. In reviewing the Commission's rules, the courts specify that the Commission must establish clear-cut criteria for evaluating the market, develop a factual record proving actual market failure based on those criteria and demonstrate that the Commission's regulations provide the necessary cure.[40] This is true even where Congress has identified a potential harm and has issued an express directive for the Commission to address it. This analysis parallels the Commission's determinations in a wide range of proceedings,

[39] Past government efforts to force providers of new services into a common carrier business model have been far from successful. One need simply look to video dialtone and the open video service for compelling examples of a failed "open access" approach.

[40] *See, e.g.*, *USTA v. FCC*, slip op. (vacating line sharing and unbundled network elements rules); *Fox Television Stations, Inc. v. FCC*, No. 00-1222 (D.C. Cir. Feb. 19, 2002) (vacating media ownership rules); *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (vacating cable ownership and access rules).

including the *Computer Inquiries* and the *AT&T Non-Dominance Proceeding,* to forego regulation when market forces are operating.[41]

Most recently, in *USTA v. FCC*, the D.C. Circuit recognized that Congress had set a difficult task in charging the Commission with identifying (and requiring ILECs to provide) those network elements whose unavailability would "impair" would-be competitors' ability to enter the market.[42] The court nonetheless vacated the Commission's unbundling rules, because the Commission had "never explicitly addresse[d] by what criteria want of unbundling can be said to impair competition in such markets," and had no evidentiary record to support a finding of material impairment in those markets.[43] The court stated that it could not uphold the rules based on the Commission's declaration that existing data left doubts regarding the extent to which alternatives to the ILECs' network elements were available to competitors.[44] As the court emphasized, such broad Commission determinations could not take the place of specific, defensible criteria for establishing the existence of market failure and actual evidence satisfying those criteria.[45]

In this case, there is no basis for the Commission to impose access requirements on the cable industry, given that (a) the Commission lacks any clear-cut, defensible criteria for

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[41] *See Computer II*, 77 F.C.C.2d at 433 (quoting Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Tentative Decision of the Commission*, 28 F.C.C.2d 291, 297-98 (1970) ("*Computer I*") ("no need to assert regulatory authority over data services," because there is competition)); Motion of AT&T to Be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271, 3274-76 (1995) (determinations concerning a firm's market power are to be based on factors including existence of competing firms and availability of substitutable services).

[42] *USTA v. FCC*, slip op. at 8.

[43] *Id.* at 9.

[44] *Id.* at 10.

[45] *Id.*

evaluating the market and (b) there is no evidence of actual market failure in any event.[46] The evidentiary bar against the Commission's imposition of access requirements is especially high for cable modem service, because – far from identifying a market harm and directing the Commission to cure it – Congress has made a specific finding that the markets for information services, particularly Internet access services, are competitive and should remain unfettered from intrusive regulation.[47] The Commission's consistent findings of healthy competition in this very market likewise preclude the imposition of access requirements.[48]

Even assuming the Commission had statutory authority to act (which it doesn't) and even if there were some evidence of market failure in the provision of broadband services (which there is not), the Commission would have to exercise considerable caution nonetheless before imposing any access obligation. Justice Breyer described the adverse social and economic consequences that result from a forced sharing requirement in his concurring opinion in *Iowa*

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[46] *See also* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T, *Memorandum Opinion and Order*, 15 FCC Rcd 9816, 9872-73 (2000) ("*AT&T/MediaOne Order*") (declining to impose access requirement "given the potential for competition from alternative broadband providers and the potential for unaffiliated ISPs to gain direct access to provide broadband services over the cable infrastructure"). While the Commission did impose certain conditions related to cable modem service in the *AOL/Time Warner Order,* those conditions were premised on the conclusion that "the unconditioned merger of AOL and Time Warner would create a company with a *unique* incentive and ability to thwart competition." Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., *Memorandum Opinion and Order,* 16 FCC Rcd 6547, 6582 (2001) (emphasis added). These concerns arose almost entirely because of AOL's preeminent status as a provider of dial-up Internet access services and content. *See id.* at 6585-87.

[47] 47 U.S.C. § 230(c).

[48] *See, e.g.*, *AT&T/MediaOne Order*, 15 FCC Rcd at 9872-73; *Third Section 706 Report*, FCC 02-33 at ¶¶ 7, 68-72, 77-78, 80-88; *Second Section 706 Report*, 22 Communications Reg. (P & F) at 451; *First Section 706 Report*, 14 FCC Rcd at 2415; *Computer II*, 77 F.C.C.2d at 433; *Computer I*, 28 F.C.C.2d at 297-98.

Utilities Board.[49] As Justice Breyer observed, even a simple obligation to share a physical facility imposes significant administrative costs because a regulatory body must oversee the terms and conditions of access. Additional costs also arise because the sharing "may diminish the original owner's incentive to keep up or improve the property by depriving the owner of the fruits of value-creating investment, research or labor."[50]

The D.C. Circuit, in *USTA v. FCC*, echoed Justice Breyer's concerns and emphasized that access regulation "imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[51] Chairman Powell similarly has recognized that "unconstrained access would eviscerate incentives for entrants to install their own facilities and thereby inhibit the type of competition most likely to spur innovation, provide price discipline and otherwise benefit consumers."[52] It is thus difficult to see how the Commission could fulfill its statutory mandate to promote "widespread and rapid deployment of high-speed services" by imposing access requirements on non-common carrier providers of these services, given the enormous operating burdens, costs and delays that establishing and enforcing such requirements would impose on industry and regulators alike.

The far better course is to allow broadband service providers to choose their own business models. In the current challenging economic climate, competition among both narrowband and broadband providers of Internet access services is forcing cable operators and

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[49] 525 U.S. at 428-29 (Justice Breyer concurring in part and dissenting in part).

[50] *Id.*

[51] *USTA v. FCC*, slip op. at 15.

[52] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Second Further Notice of Proposed Rulemaking*, 14 FCC Rcd 8694, 8717 (1999) (Separate Statement of Commissioner Michael K. Powell).

other broadband providers to take every measure to make their services as attractive as possible to consumers. At this difficult juncture in the private sector's efforts to encourage consumers' migration from narrowband to broadband services, cable operators and other broadband providers cannot afford to ignore consumers' expectation of having a choice of ISPs. Because Cox is seeking relationships with ISPs that will add value for its customers, it will not offer access on an indiscriminate basis. Yet consumers clearly will be better served because Cox has every market incentive to enter into relationships with those ISPs that can offer the additional enhancements and high-quality service its customers desire. Market forces, not government directives, will encourage cable modem and other broadband service providers to offer consumers a choice of ISPs on the most efficient terms.

III. THE USE OF SHARED SPECTRUM ON CABLE SYSTEMS RENDERS GOVERNMENT-MANDATED ACCESS IMPRACTICABLE.

The Commission's assessment of whether "it is necessary or appropriate" to impose access requirements on cable modem service also must consider the problems and costs involved in implementing such a mandate.[53] Unlike ILECs' common carrier networks and services, cable systems and cable modem services rely on shared cable spectrum. The shared nature of cable modem service poses numerous technical challenges, even when only a single provider offers Internet access over a cable system. These challenges increase significantly when additional providers are added to the network. Furthermore, mandated access inevitably would entangle the Commission in the business relationships and operations of cable operators and ISPs, imposing costs on the government, service providers and consumers that are entirely unjustified in the current environment. For these reasons, the challenges involved in accommodating additional

[53] *Ruling & Notice*, FCC 02-77 at ¶ 72.

ISPs on the cable system, without endangering the integrity of the network and customer service, are best resolved through private innovation and individually negotiated agreements.

A. A Shared-Spectrum Environment Is Not Suitable For Mandated Access.

As Cox explained in its *NOI* comments, in contrast to the discrete DSL loops that a phone company can turn over to an ISP to operate wholly independent of other operations on the telephone network, cable modem service utilizes shared spectrum on the cable system.[54] If the movement towards multiple ISPs is to achieve any marketplace success, cable operators must have the opportunity to resolve the critical technical, operational and business issues involved in accommodating additional ISPs in a customer-friendly fashion.

Like other cable operators, Cox has allocated 16 MHz of spectrum on its upgraded cable networks for cable modem service. This 16 MHz is shared by all of the cable modem service subscribers on each system.[55] The cable industry had to climb a steep learning curve to figure out how to provide a single high-speed Internet access option to subscribers under this shared spectrum approach. Not surprisingly, the use of the same 16 MHz by more than one ISP poses numerous other problems. Not only must cable operators address technical issues such as how to direct traffic from each subscriber to the correct ISP and how to allocate bandwidth among ISPs; they also must adjust for the fact that, in a shared spectrum environment, each subscriber's use directly affects all other subscribers' service, and problems with one ISP's service degrade all other ISPs' services on the system.

Careful management of the introduction of additional ISPs on the cable modem platform accordingly is critical. If the cable operator is unable to manage the cable modem service

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[54] Cox *NOI* Comments at 22-23.

[55] *Id.*

bandwidth properly, then customers will not obtain broadband speed and reliable service.[56] This is especially important because customers of cable modem service are sophisticated and will not be content to pay for high-speed service they do not consistently receive. Customers' negative perception of the service would be particularly detrimental to the industry's Herculean effort to encourage customer migration from narrowband to broadband alternatives.

To protect this critical quality of service, the cable operator must ensure that no ISP will exceed its permitted bandwidth, whether on the system overall or at individual nodes within the system.[57] Cable operators also must be able to enforce ISP compliance with strict technical specifications, to prevent interference not only with cable modem service, but also with the other services (including lifeline telephone service) that share the cable plant.[58] These issues will become increasingly important in the coming years as new bandwidth-hungry applications emerge, and customers come to rely more on their Internet service and its high-speed and reliability. Close cooperation between the cable operator and ISPs, and individual negotiation of the contractual terms and conditions for access, will be vital to address these issues.

Cable operators also must manage their growth carefully, so as to balance available bandwidth and capacity against customer growth. A cable operator can install fiber optic lines

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[56] The need for bandwidth management already is reflected in cable modem customer agreements, which prohibit uses that hog bandwidth, such as operating a server. Cox already has seen bandwidth problems arise from customer use of peer-to-peer applications such as Napster, Morpheus and Kazaa, where individual personal computer hard drives act as virtual servers that other users of the application can access to upload and download files (e.g., music files). Cox is exploring bit caps and other mechanism to address excessive use of bandwidth.

[57] Because each node has its own capacity limits, an ISP could stay within its overall limits while exceeding the available bandwidth at one or more individual points within the cable system. Customers in the affected nodes would experience slowdowns and even service failures. These concerns do not apply to DSL because the loop is not shared.

[58] This is particularly important because customers will blame the cable operator, not the ISP, for any disruptions to video or telephony services.

closer to its customers and split its service nodes to increase capacity as needed for maintenance of the service's high speed. Unlike, for instance, adding trunks to a connection between telephone switches, reducing the number of homes served by a node requires significant planning and is very expensive. Such management and planning are especially critical in today's economy, where the financial markets have little tolerance for additional capital investment. Consequently, any arrangement to introduce additional ISPs on the network would have to give the cable operator ability to control the level of new capital investment it makes in order to accommodate growth without losing quality of service.

One of the biggest conundrums of accommodating multiple ISPs is the problem of tracking and forecasting capacity consumption by individual ISPs and their customers, not only to restrict them to their permitted bandwidth, but also to plan for splitting nodes and to allocate costs among the cost-causative ISPs. The impact of this problem is limited while customer penetration is still low and the cable operator is able to work closely with a small number of ISPs who are introduced into the system on a controlled basis. However, it could cripple the network and severely degrade customer service if cable operators were forced to provide indiscriminate access to ISPs under government mandate.

Requiring cable operators simply to allocate additional spectrum to cable modem service to accommodate additional ISPs would be an unacceptable approach. "Spare room" even on upgraded cable networks already is at a premium as cable operators undertake to deploy a variety of advanced voice, video and data services in response to consumer demand. Cox, for example, already provides digital telephony and digital video services, which together consume large amounts of bandwidth. It is also in the process of launching new bandwidth-hungry services such as video-on-demand. Like the other large cable operators, Cox also must ensure that it has sufficient bandwidth to meet its commitment to carry over-the-air digital TV programming, as envisioned by Chairman Powell's voluntary program for DTV implementation.[59] Consumer demand for all of these new services is tremendous. Indeed, in contrast to the Internet access world where customers enjoy a variety of service options, in many cases, cable will be the first service provider to introduce these new advanced services to the marketplace. These efforts would be completely undermined by a government directive that cable operators increase spectrum for high-speed Internet access services. To best protect customers' interests, it must be the market, not regulation, that dictates when and how operators will allocate additional bandwidth to cable modem services.

B. Government-Mandated Access Would Require Commission Intervention To Decide Myriad Implementation Issues.

Mandated access unavoidably would embroil the Commission in a trail of implementation issues virtually impossible to list, let alone resolve in a timely fashion that promotes speedy broadband deployment. Years of debate over "open access" have yet to yield a clear definition of the term. This is because different ISPs have different demands for facilities and functions, as well as different business models, that they desire from cable operators to provide service; the service itself varies with individual ISPs who may wish to offer customers

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[59] *See* Letter from Hon. Michael Powell, Chairman, FCC, to Senator Ernest Hollings, Apr. 4, 2002, attachment at 1 (describing proposal for digital television implementation, including request for commitment from cable industry to "[o]ffer to carry, at no cost, the signals of up to five broadcast or other digital programming services that are providing value-added digital programming during at least 50% of their prime time schedule"); Letter from Robert Sachs, President and Chief Executive Officer, National Cable and Telecommunications Association, to Hon. Michael K. Powell, Chairman, FCC, May 1, 2002, *available at* *http://www.ncta.com/pdf_files/ResponsetoPowellPlan.pdf* (describing commitment of top ten cable operators, including Cox, to implement digital television transition and to meet programming carriage commitment proposed by Chairman Powell for all 750 MHz systems with 25,000 subscribers or more located in top 100 markets).

different tiers (or speeds) of service and different service capabilities. By mandating access, the Commission would put itself in the business of providing a governmental answer to each of the questions posed by these ISP demands and cable operators' constraints.

Among the most immediate would be determinations regarding whether a specific type of request must be accepted, and the extent to which a cable operator can be required to modify its cable system to accommodate a request. For instance, an ISP could request more bandwidth than currently is available, could seek to have higher upstream speeds, or could want to allow its customers to operate servers. At a more basic level, an ISP could ask for capacity to serve more customers than a cable operator's current system configuration would support. Even the process for considering a request is likely to engender controversy, particularly if a cable operator does not respond as quickly as the ISP expects, or provides reasons for denying a request that an ISP believes are insufficiently detailed or are otherwise unsatisfactory.

Similar disputes could arise over basic technical questions, including whether an ISP's request conformed to current technical standards. As described above, cable operators have a legitimate interest in maintaining the integrity of their networks, and technical compatibility is a key element in ensuring quality service to all customers.[60] This is a particular concern if ISPs attempt to offer services that differ from the standard cable modem service that the cable operator offers, or wish to connect to a cable system in ways that differ from the mechanism the cable operator uses. Such disputes are made more likely by the differing ways in which cable operators offer cable modem service, even within the context of the DOCSIS standards.[61] At the

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[60] *See* Section III(A), *supra*.

[61] Unlike the telephone industry, in which a single carrier effectively set standards and which now has operated under Commission-set standards for terminal equipment for more than 25 years, the cable industry has implemented high-speed Internet service in a variety of ways. *See*
continued...

same time, differing demands from ISPs could result in significant technical feasibility issues and even technically incompatible proposals, which could force the Commission to decide which ISP would be allowed to obtain the mandated service. Commission resolution of disputes over technical issues would be time-consuming, uncertain for the parties and, perhaps most significantly, could impose costs not just on cable operators, but on all customers of cable modem service.

In addition to the technical barriers, the Commission would be forced to address the myriad business issues raised by mandated access. The most obvious of those issues would be the rates charged by cable operators and the structure of those charges.[62] Again, rate disputes are particularly likely and difficult to resolve given the differences in the facilities, functions and capacities demanded by individual ISPs, and the differences in the infrastructure of individual cable systems. These disputes inevitably would lead to demands for the Commission to determine whether rates are reasonable, a difficult process even for services that already are regulated. The Commission likely would be called upon also to adjudicate the reasonableness of every other aspect of the business relationship, ranging from customer cutovers and service intervals to billing issues, late fees and deposits.

Regulation also would impede innovation in the methods for providing cable modem service and for accommodating additional ISPs on the network. Cable operators' individual

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In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, *Report and Order*, 13 FCC Rcd 14775, 14780 (1998) ("In contrast [to telephone networks], cable networks do not reflect universal attributes, and have substantially different designs.").

[62] For instance, cable operators might wish to charge fees based on the number of subscribers, bandwidth reserved, bandwidth used, revenues, specific services performed (such as installation) or some combination of these methods.

experimentation with different cable modem technical and business models provides important public welfare benefits. Indeed, it is the very essence of competition. Through this market process, the most efficient models will survive and be emulated. Forcing cable operators to follow a model dictated by government rather than market forces is directly contrary to congressional and Commission policy to "minimize[e] both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation."[63]

Significantly, these problems would arise regardless of the nature of any access mandate adopted by the Commission. Indeed, the regulatory model for mandated access is unimportant: The mandate itself, not the specific regulatory paradigm, is the reason disputes would arise. If the parties are not engaged in a voluntary transaction, each has an incentive to rely on the government to address issues that have not been addressed satisfactorily in negotiations. In particular, ISPs would have incentives to insist on access arrangements that benefit them, without regard for the effect on other cable modem customers, the reliability of the cable system or the reasonable financial expectations of the cable operator, in the hope that the Commission would give them what they never could get in an arm's length negotiation. In short, any access mandate is a recipe for repeated, drawn-out requests for regulatory intervention, and for Commission involvement in the minutiae of every access arrangement.

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[63] *Ruling & Notice*, FCC 02-77 at ¶ 73.